(1)

No. 92-8841

In The

Supreme Court of the United States

October Term, 1993

KITRICH POWELL,

Petitioner,

v.

NEVADA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF FOR RESPONDENT

REX BELL
Clark County District Attorney

DAN M. SEATON*
Chief Deputy District Attorney
200 South Third Street, Ste. 701
P.O. Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

Counsel for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

QUESTION PRESENTED

Did the Nevada Supreme Court's application of *McLaughlin*'s forty-eight hour limit for a magistrate's probable cause determination to Nevada's initial appearance statute constitute the determination of a federal constitutional rule requiring the retroactive application of the exclusionary rule to Powell's custodial statement to police?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

No. 92-8841

In The

Supreme Court of the United States

October Term, 1993

KITRICH POWELL,

Petitioner,

v.

NEVADA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Powell lived with Sharon Allen and her three children. During the day, Powell stayed home and took care of Melea Allen, Mrs. Allen's four-year-old daughter, while the older children were at school and Mrs. Allen was at work. (J.A. 2).

Neighbors frequently noticed that Melea had bruises on her face and legs and that on at least one occasion Melea had a lacerated chin and one of her eyes was quite red. Once, a neighbor heard Melea screaming and crying. When he saw her ninety minutes later, he noticed new bruises on her face and legs that had not been there the night before. In this neighbor's presence Powell asked

Melea how she had gotten hurt and she said, "Daddy (Powell), you did it." Powell then said, "No baby, remember you fell in the tub, remember?" Powell then repeated this conversation with Melea as if they were rehearsing. (J.A. 3).

On the evening of November 2, 1989, Melea was not herself; she was quiet and inactive. She could not move her head and was experiencing head and back pain. The side of her head was soft and spongy, and she had a new bruise on her forehead. She told her siblings and her mother that she had fallen from Powell's shoulder. (J.A. 3).

The next morning Melea was unable to hold up her head and could not walk without assistance. Her mother went to work and her brother and sister went to school; she was left alone with Powell. (J.A. 3). Powell finally decided to take Melea to the hospital and he got a ride from Mrs. Eileen Richards. Mrs. Richards testified that Powell told her that Melea had accidentally fallen from his shoulder (v. 18, 3134)[1]. By the time Melea was admitted to the hospital she was unconscious and in critical condition. (J.A. 3). Powell explained to the admitting nurse, Ms. Sylvia Clark, that Melea had accidently fallen from his shoulder (v. 18, 3136).

An examination of Melea revealed a deep laceration on her chin, which was in the process of healing, and a number of bruises which were in different stages of healing. Melea's buttocks showed a pattern of successive

---

[1] References to the record on appeal before this Court are to the volume and folio number of said record.

injuries. She was extensively bruised all over her body and her spine had been fractured. The most recent and most severe injury had caused her brain to swell and was the cause of the coma. (J.A. 3-4).

"The State's expert witness, Dr. Richard Krugman, testified that in the last three years he had seen only one head injury which was similar to Melea's. That injury resulted from an adolescent being propelled off the top of a pick-up truck at forty-five miles per hour onto a concrete surface." (J.A. 4).

Melea's injuries suggested a repetitive pattern of daily injury and all three physicians who testified agreed that Melea's injuries were not the result of accidents and that Melea had been subjected to severe abuse for some time. Melea died from the head injury on November 8, 1989 without ever regaining consciousness. (J.A. 4).

At approximately 12:45 p.m. on November 3, 1989, while at the hospital with Melea, Powell spoke with Detective Alfred Leavitt. Powell was not in police custody or under arrest, and could have left if he wanted to leave. In fact, Powell did leave on a couple of occasions to smoke a cigarette outdoors (v. 20, 3608). Powell voluntarily gave a statement to Detective Leavitt, which Leavitt recorded. At no time did Petitioner object to making a statement or having it recorded (v. 20, 3610-11).

In the statement, Powell claimed that Melea was his daughter and that Mrs. Allen was his wife. He told Detective Leavitt that he had been playing with Melea, had lifted her over his shoulder, and she had fallen backwards and hit her head (v. 20, 3617). He also said that in the past he had punished her by spanking her on the "butt," but

that he had not punished her in any other manner nor had he intentionally caused any injuries to her (v. 20, 3619). At about 3:00 p.m., approximately two hours after taking Petitioner's statement, police arrested Powell on charges of felony child abuse (Brief for Petitioner, at 6).

On Tuesday, November 7, 1989, while still in jail, Powell was read his *Miranda* rights; Powell waived his rights to remain silent and right to counsel and the police conducted a voluntary custodial interview. (J.A. 7). This second statement of Petitioner essentially restated what he had said in the noncustodial statement made November 3, 1989: that Melea had accidentally fallen from his shoulders; that the other various injuries were the result of other accidents; and that although he would physically discipline Melea he had never intended to hurt her (v. 20, 3636, 3671-78, 3683-85). Also on November 7, a magistrate, after reviewing the arresting officer's Declaration of Arrest, found probable cause for and continued detention of Powell (v. 1, 11). The following day, when Melea died, an amended criminal complaint was filed charging Petitioner with murder.

On April 5, 1991, prior to trial, Petitioner argued a motion to suppress information that had been inadvertently obtained from Petitioner's diary in connection with another case by a disinterested Deputy District Attorney (v. 10, 1578-1649). The State decided not to pursue acquisition of Powell's diary (v. 10, 1682). Petitioner made no other motions to suppress, nor did he claim that his right

to a prompt probable cause determination under *Gerstein*[2] had been violated.

In the guilt phase of the jury trial both Melea's brother and sister testified that Powell had been in the habit of hitting all three children (v. 18, 3192-93, v. 19, 344-46). Petitioner was found guilty of Murder in the First Degree and in the penalty phase he was sentenced to death. Petitioner appealed his conviction to the Nevada Supreme Court and raised the following issues on appeal:

- That Defendant's conviction should be reversed because the state failed to comply with NRS 171.178(3)
- That the trial court abused its discretion in allowing Melinda Allen to testify
- That guilt phase instruction numbers 7 (2), 9 and 10 were defective in that the terms "willful" and "deliberate" as element of first were undefined and the law pertaining therein was misstated
- That the trial court erred in giving instruction number 17 which wrongly defined the reasonable doubt standard of proof in a criminal case
- That the trial court abused its discretion in admitting hearsay testimony of an alleged sexual molestation of a child during the penalty phase
- That the trial judge committed error in giving an anti-sympathy instruction

---

[2] 420 U.S. 103 (1975).

The Nevada Supreme Court upheld the conviction and sentence. Powell petitioned for a writ of *certiorari*, and the sole issue presented to the Court was whether a state court may decline to apply a controlling Fourth Amendment decision of this Court to a case pending before it on direct appeal with impunity. On that issue alone the Supreme Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

I

Petitioner alleges that his right to a prompt probable cause determination, pursuant to *Gerstein* and *McLaughlin*, was violated. The State of Nevada argues that since the issue of whether Powell's *Gerstein* rights were violated was never passed or pressed upon by the Nevada Supreme Court, this Court has no jurisdictional grounds on which to review this matter.

This Court has held that subject matter jurisdiction fails unless a federal question has been both raised and decided in the state court below.

Not only did Petitioner fail to raise a *Gerstein/McLaughlin* issue on direct appeal, the only pre-trial motion to suppress filed did not relate to his custodial statement. Additionally, although Petitioner objected to the introduction of his custodial statements at trial, the objection was based on the best evidence rule, not the Fourth Amendment. Petitioner has never alleged a *Gerstein/McLaughlin* violation until petitioning this Court.

The assignment of error claimed by Powell to the Nevada Supreme Court was not that he was denied protection under *Gerstein/McLaughlin*, but rather that he was not properly brought before a magistrate within the seventy-two hour standard required by Nevada Revised Statute (NRS) 171.178(3). Even though the Nevada Supreme Court made note of *McLaughlin* in their opinion, the case was used merely as a reference in interpreting the "timely arraignment" requirement of Nevada Revised Statute 171.178.

The Nevada Supreme Court misconstrued this Court's forty-eight hour rule for a timely probable cause determination to be applicable to Nevada's initial appearance statute and declared the seventy-two hour period in the state statute to be unconstitutional. This Court has held that state courts should be permitted to rest their decisions on adequate and independent state grounds. The Nevada Court was merely articulating a state rule of criminal procedure. The retroactivity analysis set forth in *Griffith v. Kentucky* only applies to new federal constitutional rules. The Nevada Supreme Court was therefore not obligated to apply the *Griffith* rule in its analysis.

II

Based on the policy consideration underlying the exclusionary rule, the State of Nevada maintains that Petitioner's request for the suppression of his custodial statement be denied. The remedial effect of the exclusionary remedy of the Fourth Amendment is to deter police

misconduct in order to insure the reliability of confessions. However, where a law official's conduct is objectively reasonable, in that his actions are consistent with the law at the time of the conduct, application of the exclusionary rule fails to serve its desired deterrent effect and its application is inappropriate.

From the record, there is no evidence that the delay in Powell's initial appearance motivated him to make an involuntary custodial statement. Furthermore, after being given his *Miranda* warnings, Petitioner voluntarily waived his right to remain silent and his right to counsel. Yet, *Miranda* alone does not insure that the statements are of sufficient free will as to purge the damage of unlawful conduct. Other key factors to be taken into consideration include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.

Despite the delay in his initial appearance, Powell's Fourth and Fifth Amendment rights were adequately protected. In fact, Petitioner himself conceded this by not challenging the voluntariness of statements on direct appeal.

Finally, Powell seeks to have his conviction reversed on the basis that supposedly the Nevada Supreme Court found a *McLaughlin* violation to have occurred but failed to apply it to Petitioner's case on retroactivity grounds. Under the holding in *Gerstein*, a suspect presently being detained may challenge the probable cause for that confinement, but a conviction will not be overturned simply because the defendant was detained pending trial without a determination of probable cause. Additionally,

should this Court determine that Powell's custodial statements were improperly admitted at trial, the State submits that any allegation of error is harmless.

ARGUMENT

I THE NEVADA SUPREME COURT WAS NEVER PRESENTED WITH, NOR DID IT DETERMINE, THE QUESTION WHETHER THE STATE VIOLATED POWELL'S RIGHT TO A PROBABLE CAUSE DETERMINATION BY A NEUTRAL AND DETACHED MAGISTRATE AND THEREFORE THERE IS NO FEDERAL CONSTITUTIONAL QUESTION PROPERLY PRESENTED FOR THIS COURT'S REVIEW

A. The Issue of Whether Petitioner's *Gerstein* Rights Were Violated Was Never Pressed or Passed Upon Below

Inasmuch as Powell failed to argue to the Nevada Supreme Court on direct appeal that his rights pursuant to *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S.Ct. 1661 (1991),[3] had been violated, this Court has no jurisdictional grounds on which to review this matter. If an issue has not been presented to a state court in such a manner that it was necessarily decided by that state's highest court when it affirmed the conviction, this Court has no jurisdiction to consider the issue. *Street v. New York*, 394 U.S. 576 (1969).

[3] *McLaughlin* had been decided prior to the submission of Powell's opening brief to the Nevada Supreme Court.

In *Illinois v. Gates*, 462 U.S. 213, 218, *reh'g denied*, 463 U.S. 1237 (1983), this Court reaffirmed its position that this Court has no subject matter jurisdiction unless a federal question has been both raised and decided in the state court below, otherwise appellate jurisdiction fails. Justice Rehnquist explained the Court's underlying rationales for the "not pressed or passed upon rule."

First, when questions are not raised on direct appeal, the record is likely to be inadequate since it is not compiled with those questions in mind. *Gates*, 462 U.S., at 218; *see also, Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

In addition to failing to raise a *Gerstein/McLaughlin* issue on direct appeal, Powell also failed to raise the issue before the district court.[4] The only motion to suppress filed by Powell was his motion to suppress information inadvertently obtained by a disinterested Deputy District Attorney from Petitioner's diary in connection with another case and that motion was based solely on Fifth and Sixth amendment concerns. The State decided not to

[4] It is worth noting that this Court maintained in *Stone v. Powell*, 428 U.S. 465, (1976), *reh'g denied*, 429 U.S. 874 (1976), that although Fourth Amendment claims deter unlawful police activity, where such claims could have been raised in state court, if later raised "indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.*, 428 U.S., at 491. The policy considerations behind the ruling included: "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Id.*, (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

pursue acquisition of Powell's diary (v. 10, 1578-1649, 1682).

Additionally, the only timely objection Petitioner raised at trial about his custodial statement was based on the best evidence rule (v. 20, 3614). Never, prior to his Petition for Writ of Certiorari to this Court, did Powell ever allege that his rights to a prompt probable cause determination had been violated. And although *McLaughlin* had yet to be decided, *Gerstein* was in effect and had been for over fifteen years.

"Judicial economy requires that issues critical to the conduct of the trial, such as grounds for suppressing evidence, be presented initially to the trial judge." *United States v. Whitten*, 706 F.2d. 1000 (9th Cir 1983), *cert. denied*, 465 U.S. 1100 (1984).

The assignment of error alleged by Powell to the Nevada Supreme Court was not that he had been denied protection under *Gerstein/McLaughlin*, but that he was not brought before a magistrate within the seventy-two hour standard required by Nevada Revised Statute (NRS) 171.178(3).[5]

[5] NRS 171.178 Appearance before magistrate; release from custody by arresting officer.

1. Except as provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

Although there is no question that the Nevada Supreme Court possesses the statutory power to address

---

2. A private person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available magistrate empowered to commit person charged with offenses against the laws of the State of Nevada or deliver the arrested person to a peace officer.

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if he determines that the person was not brought before the magistrate without unnecessary delay.

4. When a person arrested without a warrant is before a magistrate, a complaint must be filed forthwith.

5. Except as provided in NRS 178.487, where the defendant can be admitted to bail without appearing personally before a magistrate, he must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.

6. A peace officer may immediately release from custody without any further proceedings any person he arrests without a warrant if the peace officer is satisfied that there are insufficient grounds for issuing a criminal complaint against the person arrested. Any record of the arrest of a person released pursuant to this subsection must also include a record of the release. A person so released shall be deemed not to have been arrested but only detained.

issues *sua sponte*, *see* NRS 178.602,[6] Petitioner's declaration that the Nevada Supreme Court properly found a straightforward violation of *McLaughlin* is inaccurate. Petitioner makes quite an assumption in his statement that the Nevada Supreme Court reached and decided the *McLaughlin* issue simply because they made note of it in their opinion. There is no indication in the Nevada Court's opinion that it was deciding a *Gerstein/McLaughlin* issue. Rather, as it pertains to the case at bar, *McLaughlin* was used as a reference in interpreting the "timely arraignment" requirement of NRS 171.178.

Additionally, state courts should be permitted to rest their decision on adequate and independent state grounds. *Gates*, at U.S. 221-222. This Court has given guidance on what constitutes independent state grounds.

> If a state court chooses merely to rely on federal precedent as it would on the precedent of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Michigan v. Long, 463 U.S. 1032, 1041 (1983). By doing so, both justice and judicial administration are greatly improved as long as the state court's decision clearly and expressly indicates that it is "alternatively based on bona

---

[6] 178.602 Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

fide separate, adequate, and independent grounds." *Id.* *See also, Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

On direct appeal, the Nevada Supreme Court, when confronted with the issue presented – failure to comply with NRS 171.178(3) – misapplied the *McLaughlin* standard for promptness in probable cause determinations to initial appearances. Petitioner alleges that the Nevada Supreme Court acknowledged a *Gerstein/McLaughlin* violation to have occurred in this case. (*See*, Brief for Petitioner, p. 4). The State disagrees. The Nevada Supreme Court merely used the forty-eight hour period[7] from *McLaughlin* to mandate, as a matter of state law, that the probable cause determination and the initial appearance shall both occur within forty-eight hours, a procedure that is not constitutionally required.

Furthermore, it is important to note that unlike Federal Rule of Criminal Procedure 5(a) and the practice followed in Riverside County, California, Clark County, Nevada does not conduct *Gerstein* probable cause determinations and initial appearances simultaneously. Rather, in Clark County, when a police officer makes a warrantless arrest, he completes a declaration of arrest form in which he sets forth the basis for the arrest (i.e., probable cause). This form is then taken by a corrections officer at the county jail to the justice of the peace designated to make a probable cause determination. If the magistrate determines that probable cause for continued detention exists, he checks the appropriate box on the form.

---

[7] *Gerstein* and *McLaughlin* were only cited peripherally by the Nevada Supreme Court in a discussion as to what constitutes a timely initial appearance in Nevada.

It is clear from the record that the Nevada Supreme Court was not deciding a *McLaughlin* issue as it pertains to Powell but rather using it as guidance on the issue of what constitutes a timely initial appearance in Nevada. In so doing the Nevada Supreme Court created higher state law protection for a criminal defendant than the Constitution requires.

The foregoing, combined with a more than cursory reading of the Nevada Court's opinion, discredits Petitioner's argument that the court decided any Fourth Amendment issue with regard to Powell's case. In terms of the Nevada Supreme Court's discussion of any possible Fourth Amendment/*McLaughlin* issue, the most that can be said is that their conclusion was an advisory opinion,[8] intended only to have prospective effect.

Thus, where there are adequate and independent state grounds for a state supreme court's opinion, this Court is without subject matter jurisdiction to affect the state judgment.

---

[8] The Nevada Court restated this Court's holding in *McLaughlin*, requiring that probable cause determinations be made within forty-eight hours of the arrest, but since *McLaughlin* was not at issue, the Nevada Court only intended for it to be applied in future cases.

B. The Retroactivity Test Espoused in *Griffith* Does Not Govern State Supreme Court Decisions That Enumerate a State Procedural Rule or That Are Based on Independent State Grounds

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court set forth a retroactivity analysis for federal constitutional applications. Specifically, when a new rule for the conduct of criminal prosecutions is cited, it is "to be applied retroactively to all cases, state or federal pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328.

As previously stated, in Petitioner's case, the Nevada Court's discussion of *McLaughlin* was used exclusively to rule that both a probable cause determination and an initial appearance must occur within forty-eight hours as a matter of state law. Therefore, since the state supreme court was only enumerating a state procedural rule, they were allowed the freedom to apply a retroactivity analysis of their own choosing.

II POLICY CONSIDERATIONS UNDERLYING THE EXCLUSIONARY RULE STRONGLY MILITATE AGAINST ITS APPLICATION IN THIS CASE

Petitioner has requested that his custodial statement be suppressed. The remedial effect of the exclusionary remedy of the Fourth Amendment is to deter police misconduct in order to insure the reliability of confessions. *United States v. Leon*, 468 U.S. 897 (1984); *Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745, *reh'g denied*, 113

S.Ct. 3066 (1993). A violation of a defendant's Fourth Amendment right to be free from unreasonable seizures does not by itself mandate that information obtained during an unlawful detention be suppressed. "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. (citation omitted)." *Leon*, 468 U.S., at 906 (1984).

The exclusion of evidence in no appreciable way furthers the ends of the exclusionary rule where a law enforcement official is acting as a reasonable officer should under similar circumstances. *Id.*, 468 U.S., at 920. Thus, excluding the evidence obtained in no way affects future police conduct unless it is to make him less willing to do his duty. *Id.*

In *Illinois v. Krull*, 480 U.S. 340, 347 (1987), this Court expanded the *Leon* exception to the exclusionary rule, concluding that "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Krull*, 480 U.S., at 349, *see also*, *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Read together, the *Leon* and *Krull* decisions stand for the proposition that where a police officer's conduct is objectively reasonable, in that his actions are consistent with the law at the time of the conduct, application of the exclusionary

rule does not beget the desired deterrent and therefore its application is inappropriate.[9]

There is absolutely no evidence in the record that Petitioner's detention provoked him to make a custodial statement that was not voluntary. Under the existing *Gerstein* rule, the states were left with a certain amount of discretion to determine what constituted a prompt probable cause determination. The fact that Powell is only now complaining of a *Gerstein* violation would seem to indicate that all the parties involved considered Powell's 1989 probable cause determination to have been prompt and within the law. Furthermore, the State was not in violation of NRS 171.178 until after the Petitioner had already voluntarily given the police his second statement, and by that time he had waived his right to a prompt initial appearance.

Even though *Miranda* warnings are a procedural safeguard necessary to protect against confessions obtained through illegal exploitations, standing alone, they are not invariably able to break the causal connection between the illegality and the confession. *Brown v. Illinois*, 422 U.S.

---

[9] Other state courts have reached the *Gerstein/McLaughlin* issue and have declined to apply the exclusionary rule as a *per se* remedy. *State v. Tucker*, 626 A.2d 1105 (N.J. Super. A.D. 1993), *cert. granted*, ___ S.Ct. ___ (1993) (holding that the delay in bringing a defendant before a magistrate for a probable cause determination is but one factor to be weighed in determining the voluntariness of the statements made during the period of detention); *State v. Koch*, 499 N.W.2d 152 (Wis. 1993), *cert. denied*, 114 S.Ct. 221 (1993) (holding that where the delay was not for the purpose of gathering additional evidence to justify the arrest, suppression of the evidence is not appropriate).

590 (1975). In *Brown*, this Court discussed in detail its concerns regarding the implications of the holding in *Wong Sun v. United States*, 371 U.S. 471 (1963), and its effect on the exclusionary rule. The principal concern enunciated by this Court in *Wong Sun*, was whether statements and other evidence obtained after an illegal arrest or search should be excluded. This Court held that it applied the exclusionary rule primarily to protect Fourth Amendment guarantees in two respects: "in terms of deterring lawless conduct by federal officers," and by "closing the doors of the federal courts to any use of evidence unconstitutionally obtained." *Brown*, 422 U.S. at 599 (quoting *Wong Sun*, 371 U.S. at 486). Furthermore, although important, protection of one's Fifth Amendment right against self-incrimination was not the Court's paramount concern. *Id.*

In *Brown*, like *Wong Sun*, the fundamental questions were whether Brown's statements were obtained by exploitation of the illegality of his arrest and whether the *Miranda* warnings, by themselves, assured that the statements were of "sufficient free will as to purge the primary taint of the unlawful arrest." This Court held that *Miranda* warnings fail to inform a suspect of his Fourth Amendment rights, including his right to be released from unlawful custody following an arrest made without a warrant. Therefore, even if statements are found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. Thus, in determining whether a confession is voluntary under *Wong Sun*, the facts of each case must be appraised separately. Although the *Miranda* warnings are important, other factors such as: the temporal proximity of the arrest and the confession,

the presence of intervening circumstances, as well as the purpose and flagrancy of the official misconduct must also be considered.[10]

In light of the *Brown* decision, it is apparent that both Powell's Fourth and Fifth Amendment rights were adequately protected, despite the delay in his initial appearance. There is no question that Petitioner's statements were voluntary. Powell himself conceded this by not challenging the voluntariness on direct appeal. Moreover, the Nevada Supreme Court's findings of fact demonstrate that in addition to him being given the *Miranda* warnings and waiving them, the circumstances surrounding his inculpatory statements prove that they were the product of his own free will and, in fact, were meant to be exculpatory. (J.A. 7). Although upon first blush the four day period between arrest and the probable cause determination could appear to be a long period of detention, at the time of Petitioner's arrest, pursuant to NRS 171.178(3), a suspect could lawfully be detained for up to seventy-two hours, excluding non-judicial days [i.e. weekends] without prejudice resulting. Hence, excluding the intervening weekend, Petitioner's second statement was made well within the seventy-two hour standard allowed by the Nevada Statute at the time of his arrest.

The Nevada Court maintained that irrespective of when Powell appeared before a magistrate, he waived his

---

[10] In his concurring opinion in *Brown*, Justice Powell stated that "in some circumstances, strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rules' deterrent purpose. *Brown*, 422 U.S., at 609.

right to remain silent and his right to counsel. (J.A. 7). By waiving those rights, he thereby waived his right to a timely arraignment. *Deutscher v. State*, 601 P.2d 407 (Nev. 1979). This statement is additional evidence of the Nevada Court's consideration of Petitioner's issue purely in terms of NRS 171.178(3), and not in terms of a *Gerstein/McLaughlin* violation.

The record in this case reveals that at all times the police conduct in this case was objectively reasonable, that said conduct was at all times within the bounds of the then-existing law, and that the delay was not for the purpose of gathering additional evidence to justify the arrest. Furthermore, the Nevada Supreme Court found that the totality of the circumstances indicated that Petitioner's custodial statement was made voluntarily after being advised of his *Miranda* rights. Considering these factors, application of the exclusionary rule would have no deterrent effect on future law enforcement misconduct. Therefore, this Court should refrain from applying the exclusionary rule and affirm the Nevada Court's judgment.

Moreover, Powell asks that the Nevada Court's judgment be reversed. (Brief for Petitioner at 15). Even assuming *arguendo* that the Nevada Supreme Court was required to apply *McLaughlin* retroactively, this Court is under no obligation to reverse Powell's conviction.

With respect to Petitioner's statement that his conviction should be reversed, the State would note that in *Gerstein* this Court specifically held that an illegal detention does not void a subsequent conviction. Moreover,

"although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein* 420 U.S., at 119.

Even if this Court finds that Powell's custodial statement should not have been admitted, the district court's admission of this statement was harmless error. The content of Petitioner's custodial statement was essentially the same as a previous statement he had made to the police. And there was evidence independent of Powell's statements to the police that Powell had hit the Allen children and that he claimed that the injury causing Melea's death resulted from her accidentally falling from his shoulders.[11]

Therefore, Petitioner's request for reversal should not be granted based on the fact that: (1) *Gerstein* itself does not require reversal in cases of prolonged detention; and (2) should this Court determine Petitioner's custodial

[11] At trial, Mrs. Eileen Richards testified that the day of Melea's injury she drove Petitioner and the child to University Medical Hospital. During the drive, Powell explained how Melea's injuries occurred. He said he had been playing with her when she slipped and fell from his shoulders, hitting the floor head first. (v. 18, 3134).

Ms. Sylvia Clark, a registered nurse at University Medical Hospital, testified that as Powell rushed Melea into the hospital he claimed the child had fallen from his shoulder the day before. (v. 18, 3136).

In addition, the two Allen children both testified that Petitioner frequently hit them and Melea. (v. 18, 3192-3193, v. 19, 3344-3346).

statement was improperly admitted at trial, any allegation of error is harmless.

CONCLUSION

Based on the foregoing, the judgment of the Supreme Court of Nevada should be affirmed.

December 1993

Respectfully submitted,

REX BELL
Clark County District Attorney

DAN M. SEATON*
Chief Deputy District Attorney
200 South Third Street, Ste. 701
P.O. Box 552212
Las Vegas, Nevada 89155-2212

Counsel for Respondent
*Counsel of Record

Counsel gratefully acknowledges the substantial assistance of Kimberly Maxson and Christopher Laurent, law clerks, in the preparation of this brief.